Supreme Court No. 84855-6

SUPREME COURT OF THE STATE OF WASHINGTON

CERTIFICATION FROM THE UNITED STATES DISTRICT COURT,
EASTERN DISTRICT OF WASHINGTON

IN

CHAD M. CARLSEN and SHASTA CARLSEN;
husband and wife, individually and on behalf of
a Class of similarly situated Washington families; and
CARL POPHAM and MARY POPHAM,
husband and wife, individually and on behalf of
a Class of similarly situated Washington families,

Plaintiffs,

vs.

GLOBAL CLIENT SOLUTIONS, LLC, an Oklahoma limited
liability company; ROCKY MOUNTAIN BANK & TRUST,
a Colorado financial institution; et al.,

Defendants.

PLAINTIFFS' RESPONSE TO BRIEF AMICUS CURIAE OF NOTEWORLD, LLC

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I. INTRODUCTION

NoteWorld, LLC ("NoteWorld") is "a payment servicer that collects, processes, and disburses payments for customers in debt reduction programs[.]"[1] The business models of NoteWorld, as well as Global Client Solutions ("GCS"), were created in response to perceived loopholes in consumer protection laws—specifically on the belief that debt adjusting statutes (and, notably, the fee limitations) are applicable only when a debt settlement company both negotiates *and* receives funds for the purpose of distributing the same to creditors in payment or partial payment of obligations of a debtor.

As a result, debt settlement companies have integrated entities like NoteWorld and GCS into their operations to serve as middlemen and handle debtors' funds. Indeed, as recently explained by the United States Government Accountability Office ("GAO"),

> The [debt settlement] process typically requires consumers to make monthly payments to a bank account from which a settlement company will withdraw funds to cover its fees. Some companies require consumers to set up accounts at specific banks...

Debt Settlement: Fraudulent, Abusive, and Deceptive Practices Pose Risk to Consumers, Testimony Before the Comm. On Commerce, Science, and Transportation, U.S. Senate, GAO-10-593T (Apr. 22, 2010); *available online at* http://www.gao.gov/new.items/d10593t.pdf.

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[1] http://www.noteworld.com/OurServices/DebtReduction/DSCFAQ

In its Amicus filing, NoteWorld labors to factually frame itself as something other than a debt adjuster. These efforts are more appropriately scrutinized at the trial level by the finder of fact. NoteWorld also makes a number of arguments that simply do not comport with a fair reading and application of the plain language of Washington's Debt Adjusting Act ("DAA"). Furthermore, the newly amended Telemarketing Sales Rule and the policies underlying it comport with and further the goals of both the Washington DAA. Finally, the limited exclusion in RCW 18.28.010(2) does not apply to entities such as NoteWorld or GCS because they are not banks and or other financial institutions whose entry into the field is licensed or otherwise regulated.

II. ARGUMENT

A. NoteWorld's Arguments Do Not Withstand a Reading and Application of the Plain Language of chapter 18.28 RCW.

The overarching "aim of statutory interpretation is 'to discern and implement the intent of the legislature.'" *Sheehan v. Transit Auth.*, 155 Wn.2d 790, 797, 123 P.3d 88 (2005) (quoting *State v. J.P.*, 149 Wn.2d 444, 450, 69 P.3d 318 (2003)). Courts "assume the legislature means exactly what it says . . .[,]" *In re Wissink*, 118 Wn. App. 870, 874, 81 P.3d 865 (2003), and will "evaluate a statute's plain language to determine legislative intent." *Greenen v. Bd. of Accountancy*, 126 Wn. App. 824,

830, 110 P.3d 224 (2005). NoteWorld presents a number of arguments that do not square with a reading and application of the statute's plain language.

NoteWorld first attempts to factually argue that it does not receive funds *for the purpose of distributing funds* amongst creditors. This litigation position, however, does not square with NoteWorld's own characterization of *itself* to the public, however, as a company that handles "creditor disbursements" and ensures creditor "disbursements are made accurately and to multiple recipients[.]"[2] *See* NoteWorld/Our Services/Debt Settlement Companies/How it Works; *see also id.* ("NoteWorld's services also include . . . daily processing and *disbursement of creditor payments* . . . Once a settlement has been reached . . . NoteWorld will send the negotiated payment amount to your client's creditor") (emphasis added); *see also* ("Global Client Solutions, LLC (GCS) is in the business of receiving funds for the purpose of distributing those funds among creditors . . ."). [3] The activities of entities such as GCS and NoteWorld meet the definition of a "debt adjuster"

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[2]available at http://www.noteworld.com/OurServices/DebtReduction/DSCDemoScript.

[3] In addition, NoteWorld's arguments, predicated on non-existent factual findings, are more appropriately made to the trial court. *See Danny v. Laidlaw Transit Servs., Inc.*, 165 Wn.2d 200, 205, 193 P.3d 128 (2008).

because such entities are in the business of "receiving funds for the purpose of distributing said funds amongst creditors . . ." RCW 18.28.010(1).

NoteWorld strangely contends that including entities like it within the scope of the Debt Adjusting statute would allow companies to charge consumers fees of thirty percent. Putting aside that NoteWorld's position is that such companies are subject to no fee limitation whatever, RCW 18.28.080 requires that "*[t]he total fee* for debt adjusting services" be less than fifteen percent. (Emphasis added.)

Finally, NoteWorld turns the statute on its head by arguing that, because its business practices do not conform to Washington's DAA, it is, therefore, not a business subject to that Act. *See, e.g.*, NoteWorld's Brief at 6-7 (stating that NoteWorld does not distribute 85 percent of consumers' funds every 40 days as required by RCW 18.28.110(4)). RCW 18.28.010(1) and (2), however, serve to define those businesses subject to the requirements imposed by the Act. The requirements of the Act do not serve to identify those businesses whose activities constitute "debt adjusting." Were the case otherwise, debt adjusters could avoid the proscriptions of the Act by violating the proscription.

B. The Legislative History of the DAA Supports Its Application to NoteWorld and GCS.

At the time that chapter 18.28 RCW was enacted, debt adjusting business models spanned a variety of practices. The Washington statute reflects this diversity by protecting consumers from unscrupulous practices of "debt adjusters," a term that expansively included debt poolers, debt managers, debt consolidators, debt proraters, and credit counselors. RCW 18.28.010(2). The term "debt adjuster" and "credit counselor" have been used interchangeably in the past to refer to this broad field of business activity. *See* Leslie E. Linfield, *Uniform Debt Management Services Act: Regulating Two Related—Yet Distinct—Industries*, 28 Am. Bankr. Inst. J. 50, 51 (2009) ("The consumer credit-counseling industry originated in the early twentieth century in the form of for-profit debt adjusters (also known as debt poolers, debt consolidators, debt managers, or debt proraters). This early type of credit counseling consisted of individuals who set up as for-profit local enterprises that communicated with a consumer's local creditors to persuade them to accept partial payment in full satisfaction of the consumer's obligations.")

In today's nomenclature, "credit counselor" is a term that is often used in industry parlance to identify a non-profit entity that assists debtors in managing their difficult financial situation. *See* Ryan McCune

Donovan, *The Problem With the Solution: Why West Virginians Shouldn't "Settle" for the Uniform Debt Management Services Act*, 113 W. Va. L. Rev. 209, 218 (2010) (noting that in the mid-1980s, "the debt adjusting industry reinvented itself as the non-profit 'credit counseling' industry, led by the National Foundation for Consumer Credit (NFCC), an association of local retailers and banks that issued credit cards." (*citing* Linfield, *Uniform Debt Management Services Act: Regulating Two Related—Yet Distinct—Industries*, 28 Am. Bankr. Inst. J. 50 (2009)).

NoteWorld would have this Court employ a present-day fashion in terminology ("credit counseling") to narrowly construe the language of a 1967 consumer protection statute. The intent of the legislature to define "debt adjusting" in an expansive and non-technical manner, however, is demonstrated by its having defined "debt adjusting" through an inclusive range of various activities, all of which constituted "debt adjusting."

C. The Newly Enacted Telemarketing Sales Rule Complements and Supports Washington's DAA.

At the request of more than 40 state attorneys general, including Washington's own, the Federal Trade Commission ("FTC") recently amended its Telemarketing Sales Rules ("TSR") to regulate certain activities in the debt relief industry.

The new rules, among other things, prohibit the charging of up-front fees prior to actually effectuating a settlement of debt. *TSR Final Rule Amendments,* 75 Fed. Reg. 48,458 (Aug. 10, 2010) (to be codified at 16 C.F.R. pt. 310). This new rule augments state's efforts to protect consumers through debt adjusting statutes that also restrain upfront fees.

Cognizant of these parallel state debt adjusting statutes, the FTC provided that "state laws can impose additional requirements as long as they do not directly conflict with the TSR." *TSR Final Rule Amendments,* 75 Fed. Reg. 48,458, 48480, n. 312. The issue of preemption may arise when compliance with both the TSR and state law is *impossible*. *See id.*; *see also California v. ARC Am. Corp.*, 490 U.S. 93, 100-01 (1989) (conflict preemption only occurs "when compliance with both state and federal law is impossible or when the state law 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'" (citation omitted). The TSR amendments, therefore, were expressly intended to complement state consumer protection laws regulating the debt adjusting industry. 75 Fed. Reg. 48,458, 48480, n. 312.

NoteWorld does not identify any provision of the DAA relevant to the questions certified that renders the DAA in conflict with the TSR. NoteWorld notes that Washington's law requires debt adjusters to distribute debtors' funds within forty days, while the TSR requires that a

trust account belonging to the debtors be established to hold funds received. *See* NoteWorld Brief at 15, n.8. These provisions, immaterial to the certified questions posed, are not in conflict. Indeed, the DAA itself requires that consumers' funds be held in trust. RCW 18.28.150.

The TSR, further, does not eviscerate state debt adjusting statutes as they relate to debt adjusting activities of entities such as GCS or NoteWorld. To the contrary, the TSR specifically identifies GCS and NoteWorld, enumerates consumer protections applicable to such entities, and declares that "the Commission will be monitoring practices related to [their] fees, and it may take further action, if needed, to address any deceptive or abusive fee practices in connection with the accounts."[4]

The TSR, it should be noted, was supported by forty-one state attorneys general, including Washington's own. *See* National Association of Attorneys General, Letter Re: Telemarketing Sales Rule – Debt Relief

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[4] The five requirements applicable to NoteWorld and GCS are as follows: (1) the account where the funds are held must be insured; (2) the customer must own the funds and receive interest; (3) the third-party administering account cannot be controlled or owned by or affiliated with the debt settlement company; (4) the third-party cannot pay for referrals for business "involving the debt relief service"; and (5) "the customer may withdraw from the debt relief service at any time without penalty, and must receive all funds in the account, other than funds earned by the debt relief service in compliance with § 310.4(a)(5)(i)(A) through (C) within seven (7) business days of the customer's request." *See TSR Final Rule Amendments,* 75 Fed. Reg. 48,458, 48519-20.

Amendments (Oct. 23, 2009)[5] ("NAAG Letter") ("The States applaud the FTCs undertaking this rulemaking because, as detailed below, the actions of debt relief companies have resulted in substantial increases in consumer complaints being filed with the States across the country.").[6] The National Association for Attorneys General argued that "prohibiting the charging of advance fees will prevent the substantial monetary losses complained of by consumers and is consistent with state and federal precedent." NAAG Letter at p. 9.

D. The Uniform Debt-Management Services Act ("UDMSA"), Enacted by a Limited Number of States in Recent Years Sheds No Light on the Washington Legislature's Intent.

NoteWorld posits that language found in the Uniform Debt-Management Services Act should influence the Court's interpretation of Washington's DAA. The model act was drafted in 2005 and has been adopted by six states and the Virgin Islands. In 2009, a bill was introduced in the Washington Legislature to adopt the UDMSA. The bill died in the legislature. 2009 Bill Text WA H.B. 1213. The model act is, thus, immaterial to interpretation of interpreting the Washington DAA.

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[5] *available at*: http://www.ftc.gov/os/comments/tsrdebtrelief/543670-00192.pdf, (last visited March 3, 2011).

[6] FTC has stated that "[i]n the context of the widespread deception in this industry, the advance fee model used by many debt settlement providers causes substantial consumer injury." *TSR Final Rule Amendments*, 75 Fed. Reg. 48,458, 48463.

See, e.g., *Tafoya v. Sears Roebuck & Co.*, 884 F.2d 1330 (10th Cir. 1989); *Hughes Elec. Corp. v. Citibank Delaware*, 120 Cal. App. 4th 251, 258 (2004) ("Typically, when a legislature models a statute after a uniform act, but does not adopt the particular language of that act, courts conclude the deviation was deliberate and that the policy of the uniform act was rejected."); *see generally Gem Mfg. Corp. v. Lents Indus.*, Inc., 276 Ore. 87, 554 P.2d 166 (1976); *McCardell v. Davis*, 49 S.D. 554, 207 N.W. 662 (1926).

E. The Limited Exclusions in RCW 18.28.010(2) Are Inapplicable to Entities Like NoteWorld and GCS.

NoteWorld, GCS, and similar entities do not fall within the limited exclusion for banks in the DAA, because they are not banks, they are not licensed as banks, and their entry into their field is not governed by banking laws. In *State v. Reader's Digest Assn.*, 81 Wn.2d 259, 501 P.2d 290 (1972), a party argued that its lottery activities were exempt from the Consumer Protection Act because the FTC both permits and regulates it. As articulated by the Court, however, "[t]he argument is not preemption, but rather that respondent's activity is exempt under RCW 19.86.170." *Id.* at 278. That particular provision provides:

> Nothing in this chapter shall apply to actions *or transactions otherwise permitted, prohibited or regulated under laws* administered by the insurance commissioner of this state, the Washington utilities and transportation

> commission, the federal power commission *or any other regulatory body or officer acting under statutory authority of this state or the United States* . . .

RCW 19.86.170 (emphasis added). The Court found that the FTC was not a regulatory body as that term was defined in the statute because the FTC does not license or permit entities to engage in activities. As explained by the Court:

> The specific agencies or bodies mentioned in the statute all regulate areas where permission or registration is necessary to engage in an activity. Once the requisite permission is obtained, the activity is subject to monitoring and regulation. The FTC, however, is not such an agency. It has no control over entry into its area of concern. It merely monitors the business practices of those who freely enter its domain.

Reader's Digest Assn., 81 Wn.2d at 303.

Similar to the exemption contained above, RCW 18.28.010(2)(a) exempts, *inter alia*, "[a]ny person, partnership, association, or corporation doing business under and as permitted by any law of this state or of the United States relating to banks . . ." NoteWorld and GCS are not permitted or registered as banks, nor are they permitted or registered by the FTC.[7]

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[7] NoteWorld argues for an exclusion based on its contention it is a money transmitter, which is outside the record and issues certified by the trial court. *Broad v. Mannesmann*, 141 Wn.2d 670, 676, 10 P.3d 371 (2000) (citing *Wilmot v. Kaiser Aluminum & Chem. Corp.*, 118 Wn.2d 46, 78-79, 821 P.2d 18 (1991))("Where an issue is not within the certified questions, and is within the province of the federal court, this court will not reach the issue.")

The very fact that the FTC's new TSR applies to NoteWorld and GCS demonstrates that they are not doing business under laws or as permitted by laws relating to banks. *See* 15 U.S.C. § 45(a)(2) (stating that the FTC is "empowered and directed to prevent persons, partnerships, or corporations, *except banks* . . . from using unfair methods of competition in or affecting commerce and unfair or deceptive acts or practices in or affecting commerce.") (Emphasis added.) Entry into their business field as it relates to their debt adjusting activities, is not regulated or permitted by any federal or Washington state agency. Thus, entities like NoteWorld and GCS engaged in activities identified in certified question numbers one and two do not meet the limited exclusion found in RCW 18.28.010(2).[8]

III. CONCLUSION

For the reasons set forth above, Plaintiffs respectfully request the Court conclude that entities like NoteWorld and GCS are debt adjusters under the Washington DAA. NoteWorld and GCS receive debtors' funds for the purpose of distributing funds to creditors, acting as an integral part of debt settlement programs. Such a conclusion is faithful to the plain language of the DAA and its legislative history, as well as the recently

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[8] NoteWorld does not address the fact that entities like itself and GCS are also *primarily* liable for the aiding and abetting unfair or deceptive acts under Washington common law.

enacted TSR. Further, the limited exclusion for banks is inapplicable because NoteWorld and GCS are not licensed as banks and there is no entity that permits or controls their entry into the field.

Respectfully submitted this 4th day of March, 2011.

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CERTIFICATE OF FILING AND SERVICE

I hereby certify that on this 4th day of March, 2011, I caused this Plaintiffs' Response to Brief Amicus Curiae of NoteWorld, LLC to be filed with the Supreme Court of the State of Washington and the same to be served, via email to the following:

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